Supreme Court, U.S.
FILED
No. 10
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IN THE
SUPREME COURT OF THE UNITED STATES

JAMES B. THOMPSON,

Petitioner

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS,

Respondent,

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Federal Circuit

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Dated: April 9, 2010

QUESTION PRESENTED

THIS PETITION PRESENTS THIS ISSUE:

WHEN A VETERAN SEEKS DISABILITY COMPENSATION FOR A SERVICE CONNECTED DISABILITY, PURSUANT TO 38 USC § 5103 (A) DOES THE VETERANS ADMINISTRATION DEPRIVE THE VETERAN OF A SUBSTANTIAL VESTED RIGHT WITHOUT DUE PROCESS IF THE VA DOES NOT REQUIRE A MEDICAL EXAMINATION TO DETERMINE THE EXTENT OF HIS DISABILITY?

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, James Thompson, respectfully petitions this court for a Writ of Certiorari to review the decision of the U.S. Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The U.S. Court of Appeals for the Federal Circuit affirmed the decision of the Court of Appeals for Veterans Claims. Both decisions are reproduced and attached hereto.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Federal Circuit was entered on October 13, 2009. This court has jurisdiction under 28 U.S.C § 1254 (1).

STATUTORY PROVISIONS INVOLVED

The statute as issue in this case is 38 USCS § 5103A. It provides in pertinent part:

(d) Medical Examinations for Compensation Claims.

(1) In the case of a claim for disability compensation, the assistance provided by the Secretary under subsection (a) shall include providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim.

(2) The Secretary shall treat an examination or opinion as being necessary to make a decision on a claim for purposes of paragraph (1) if the evidence of record before the Secretary, taking into consideration all information and lay or medical evidence (including statements of the claimant)

(A) contains competent evidence that the claimant has a current disability, or persistent or recurrent symptoms of disability; and

(B) indicates that the disability or symptoms may be associated with the claimant's active military, naval, or air service; but

(C) does not contain sufficient medical evidence for the Secretary to make a decision on the claim.

STATEMENT OF THE CASE

In 2002, the veteran sought to reopen his earlier claims for service connection of asthma and a low back disorder. The regional office (RO) found that new and material evidence sufficient to open the claims had not been submitted. The veteran appealed from that finding. In May 2004, the matter was considered by the Board of Veterans Appeals. In testimony before the Board, the veteran provided the allegation of service connection to his ailments. On September 3, 2004, the board determined that the veteran had failed to submit new and material evidence, and affirmed the regional office.

The Court of Appeals for Veterans Claims affirmed in an unpublished decision dated March 13, 2007. On January 10, 2008, the U.S. Court of Appeals for the Federal Circuit reversed the

judgment of the Court of Appeals for Veterans Claims and remanded the matter for further proceedings consistent with *Sanders vs. Nicholson*, 487 F. 3d 881 (Fed. Cir. 2007).

On April 14, 2008, the Court of Appeals for Veterans Claims ordered the parties to submit supplemental briefing regarding whether the Secretary met the burden under *Sanders* to determine whether any notice errors regarding the appellant's claim under VCAA affected the essential fairness of the adjudication. On December 23, 2008, the Court of Appeals for Veterans Claims concluded that there was no prejudice to the veteran and affirmed the Board's September 3, 2004 decision. The Federal Circuit affirmed this decision on October 13, 2009.

REASONS FOR GRANTING THE WRIT

The Federal Circuit and Court of Appeals of Veteran Claims have both misunderstood the impact of the Veterans Claim Assistance Act. (hereinafter "VCAA"). Under VCAA, if the veteran makes a claim for disability compensation, has established current disability, indicated that the symptoms may be connected and his records do not have sufficient medical material to make a decision in the claim, then a medical examination shall be administered. (Emphasis added). In this case, the Court and the Secretary were focused on the veteran's medical records and both seemed to be satisfied with identifying and securing medical records, but failed and refused to order a medical exam for his asthma. In fact, the Court of Appeals for Veteran Claims in its order dismissing petitioner's appeal stated: The

Court concludes, given the appellant's own assertion that these records were impossible to obtain, that "VA complied with the duty to assist." Memorandum decision, Court of Appeals for Veteran Claims, March 13, 2007.

This matter is of grave statutory significance to veterans. It is clear from the plain meaning of the statute the steps that the secretary must take to assist the veteran, but both lower courts found the Department of Veteran Affairs to be in compliance with congressional intent of 38 U.S.C § 5103 A(d). Under U.S.C. § 5103 A(d), the veteran was obligated to provide evidence of service connection and his disability.

In the case at hand, Mr. Thompson provided evidence of his exposure to extreme cold, for the asthma, and his recall of heavy lifting for the back

injury. He had no medical evidence connecting his medical condition to his military service, but in the face of his anecdotal evidence, the VA should have ordered a medical opinion.

As Judge Gazara of the Federal Circuit explained in his dissenting opinion in *James R. Cook v. Secretary of Veterans Affairs,* 318 F 3d 1334 (Fed. Cir. 2002), the duty to assist is an integral part of the pro-claimant non-adversarial claims adjudication process of the Department of Veterans Affairs ("VA"). Congress expressly stated that the VA must "fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits. " H.R. Rep. No. 100-963 at 13, reprinted in 1988 U.S.C.C.A.N. 5782, 5795." VA decisions on records that are less than thoroughly and adequately prepared may go unchallenged and the veteran will

lose years of earned benefits that, but for the VA's breach of its duty to assist, he or she would have collected. In an adversarial system, it may be appropriate to dismiss a claimant who does not immediately challenge a decision. But in a paternalistic system, where a claimant is led to believe that his or her claim is being fairly and accurately decided to afford him or her the fullest compensation he or she is due, it is readily apparent why a decision may not be promptly challenged. The VA is charged with the development of the merits of a claim and acts a final adjudicator as well; there must be a remedy when it fails in its responsibility. To allow the organization to default in its development of a claim and then to adjudicate it without the possibility of challenge is injustice.

According to *Board of Regents v. Roth*, 408 U.S. 564, (1972), to have a property interest in a government benefit, "a person clearly must have more than an abstract need or desire for the benefit. He or she must have more than a unilateral expectation of it. He or she must, instead, have a legitimate claim of entitlement to it. Id. At 577. Entitlements derive from "an independent source such as state law," that is, statutes or regulations" that secure certain benefits and that support claims of entitlements to those benefits. For the same reason property interests were found in these cases, a veteran's interest in continued receipt of service-connected death and disability benefits is also a property interest. In determining what process is due, the court must employ a flexible balancing test that takes into account the particular facts and

unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cook, supra*.

Due process includes minimal protections for property interests of unrepresented veterans. When a veteran is not represented by counsel, the Secretary has a heighted duty to assist veterans by conscientiously developing and obtaining all the relevant evidence. The Secretary must be especially diligent in ensuring that favorable as well as unfavorable facts and circumstances are elicited.

Moreover, where so much of the evidence in VA adjudications is circumstantial at best, the results of a medical examination for a veteran are often the determinative factor in the claim adjudication process. An insufficient examination also breaches the VA's duty to assist the veteran in

fully developing his or her claim because such evidence is needed to determine whether the veteran is eligible for benefits and the amount of any such benefits. *Cook, supra*.

In the case at hand, the Government provided no assistance to the veteran when it denied his first claim for compensation in June, 2001. Even though the VCAA became law in November 2000, the Government apparently decided that no assistance was mandated because his claim pre-dated the enactment of the VCAA. However, the ruling on Mr. Thompson's claim in the instant case was announced in June 2001. All the Government had to do in June, 2001 would have been to order a medical exam to determine if the veteran had a rational nexus between his claimed disability and his military service.

However, because the veteran did not appeal the June, 2001 decision, the Government has boot strapped the failure to provide " new and material evidence" to the un-appealed decision and has relied on the finality rule to deny his subsequent claims.

Had the Government ordered a medical exam June, 2001, the Government would have met its VCAA duty and this case would not be before this court some eight years later. Accordingly, this court should find that the failure of the VA to order a medical exam in the June 2001 decision was an error in that the statute (38 U.S.C. § 5103 A(d) directly requires a medical review. This court should remand this case to the Board of Veterans Appeals for compliance with the VCAA and direct a medical exam to determine if a nexus exists between the claimed disability and the veteran's service.

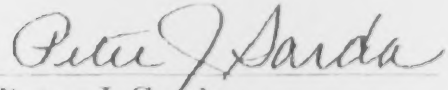
Conclusion

Because the statutory scheme relating to Mr. Thompson's appeal is clear and unequivocal this court should find that he was denied assistance by the VA and the VA should be directed to provide the essential medical evaluations contemplated by 38 U.S.C § 5103 A(d).

Respectfully submitted:

This the 9th day of April, 2010.

CREECH LAW FIRM, P.A.



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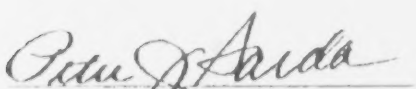
CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains no more than 13 pages.

This the 9th day of April, 2010.

CREECH LAW FIRM, P.A.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit was served upon the following by depositing a copy of said document into the U.S. Mail, postage prepaid:

David F. D'Alessandris
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This the 9th day of April, 2010.

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NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2009-7070

JAMES B. THOMPSON,

Claimant-Appellant,

V.

ERIC K. SHINSEKI, Secretary of Veterans Affairs,

Respondent-Appellee.

Judgment

ON APPEAL from the United States Court of Appeals for Veterans Claims

in CASE NO(S). 04-2176.

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (MAYER, LOURIE, and PROST, Circuit Judges) AFFIRMED. See Fed. Cir. R. 36.

ENTERED
BY ORDER OF THE COURT

DATED OCT 13 2009

14

ISSUED AS A MANDATE: DEC 4 2009

Jan Horbaly, Clerk

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR

VETERAN'S CLAIMS

No. 04-2176 JAMES B THOMPSON, APPELLANT,

V.

R. JAMES NICHOLSON,
SECREARY OF VETERANS AFFAIRS, APPELLEE.

Note: Pursuant to U.S. Vet. App. R. 30(a) this action may not be cited as precedent.

MOORMAN, *Judge:* The appellant, James B. Thompson, appeals through counsel September 3, 2004, Board of Veterans' Appeals (Board) decision that determined that new and material evidence to reopen his claims for entitlement to service connection for a low back disorder and for asthma had not been received. Record (R.) at 1-9. Both parties have filed briefs, and the appellant has filed a reply brief. On appeal, Mr. Thompson argues that VA failed to comply with its duties to notify and assist him with his claims. *See* Appellant's Brief (App. Br.) at 6-18. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). A single judge may

conduct this review. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons set forth below, the Court will affirm the September 2004 Board decision.

Mr, Thompson served on active duty in the U.S. Army from December 1961 to September 1964. R. at 13. In January 2000, Mr. Thompson filed claims for service connection for a low back condition and asthma. R at 57-58. In March 2000 and May 2001, a VA regional office (RO) denied Mr. Thompson's claims because the evidence failed to show that his low back strain or asthma were incurred in or aggravated by his period of service or that there was evidence of a nexus between the conditions and service. R. at 136-41, 143 46. Mr. Thompson did not appeal the May 2001 RO decision, and it became final.

In July 2002; Mr. Thompson requested that the RO reopen his claims for service connection for, inter alia, low back strain and asthma. R. at 148. In August 2002, the RO sent Mr. Thompson a letter informing him of the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106- 475, 114 Stat. 2096. R. at 340. In December 2002, the RO declined to reopen Mr. Thompson's claims. R. at 367-70. Mr. Thompson filed a

Notice of Disagreement (NOD) in July 2003, and he was afforded a VA medical examination in September 2003. R. at 374, 464-66. In November 2003, the RO issued a Statement of the Case (SOC) *in* which it found that the September 2003 VA examination constituted new and material evidence sufficient to reopen the claim; however, the RO denied service connection for both conditions based on a lack of evidence that the conditions began in service. R. at 472-85. Mr. Thompson filed *a* Substantive Appeal, and, in May 2004, Mr. Thompson was afforded a hearing before the Board. R. at 540-58. In September 2004, the Board issued the decision on appeal. R. at 1-9.

Pursuant to the VCAA, the Secretary is required to inform the claimant of the in formation and evidence not of record (1) that is necessary to substantiate the claim, (2) that the Secretary will seek to obtain, if any, and (3) that the claimant is expected to provide, if any. *See* 38 U.S.C. § 5103 (a); *Quartuccio v. Principi,* 16 Vet.App. 183, 187 (2002). The Secretary is also required to "request that the claimant provide any evidence in the claimant's possession that pertains to the claim." 38 C.F.R. § 3.159(b)(1) (2006); see *Pelegrini v. Principi,* 18 Vet.App. 112, 121 (2004). The Secretary's failure to

inform the appellant of what evidence was necessary to substantiate his claim is presumptively prejudicial. *See Overton v. Nicholson,* 20 Vet.App. 427, 436 (2006); *Mayfield v. Nicholson,* 19 Vet.App. 103, 120-21 (2005), *rev'd on other grounds, Mayfield v. Nicholson;* 444 F.3d 028 (Fed. Cir. 2006). The provisions of the VCAA apply to claims to reopen a previously denied claim, and the Court has held: "VA must notify a claimant of the evidence and information that is necessary to reopen the claim and VA must notify the claimant of the evidence and information that is necessary to establish his entitlement to the underlying claim for the benefit sought by the claimant." *Kent v. Nicholson,* 20 Vet.App. 1, 9 (2006).

The appellant's first argument concerning the duty to notify is that "VA must explain what evidence must be submitted to win this claim and what evidence this claim is lacking." App. Br. at 8. However, this argument is without merit because the Secretary has no duty to provide this type of notice. *See Locklear v. Nicholson,* 20 Vet.App. 410, 415-16 (2006) (stating that section 5103(a) does not require "predecisional adjudication' of evidence and "the duty to notify deals with evidence gathering, not the analysis of already gathered evidence").

The appellant also contends that "the Secretary

failed to adjudicate the May 2001 Rating Decision since the VCAA notices prior to that time were not in accordance with the VCAA 2000." App. Br. at 6. The Court has no jurisdiction to consider this argument because the May 2001 RO decision became final when the appellant failed to file a timely appeal following that decision. However, to the extent that the appellant argues that VA failed to satisfy its duty to notify him with respect to his July 2002 request to reopen his claims, the Court has jurisdiction to address this argument because it was the subject of a timely-appealed final Board decision. *See* 38 U.S.C. § 7266(a); *Breeden v. Principi*, 17 VetApp. 475, 477-78 (2004); *Bondy v. Derwinski*, 2 Vet.App. 376, 377 (1992) (per curiam order) (holding that the Court's jurisdiction is confined to a review of final Board decisions adverse to the claimant).

With respect to his July 2002 request to reopen, the Board found that VA provided the appellant with VCAA notice in the August 2002 letter from the RO. *See* R. at 3. The Court concludes that the Board erred in this regard because, although this letter generally informed the appellant that he needed new and material evidence to reopen his claims; it did not contain notice that was sufficiently tailored to the appellant's claims to

reopen. *See* R. at 3; *see also Kent, supra; Locklear,* 20 Vet.App. at 416. Specifically, the August 2002 letter did not describe what information or evidence was necessary to substantiate the elements required to establish service connection that were found insufficient in the previous denial. *See R.* at 340-41; *Kent,* 20 Vet.App. at 10 ("[T]he VCAA requires the Secretary to look at the bases for the denial in the prior decision and to respond With a notice letter that describes what evidence would be necessary to substantiate that element or elements required to establish service connection that were found insufficient in the previous denial. Therefore, the question of what constitutes material evidence to reopen a claim for service connection depends on the basis on which the prior claim was denied."). Having found error, the Court must take due account of the rule of prejudicial error. *See Conway V. Principi,* 353 F.3 d 1369, 1375 (Fed. Cir. 2004); *Overton,* 20 Vet.App. at 433. To do so, the Court will examine the entire record to determine whether the appellant had a meaningful opportunity to participate in the processing of his claims.

In its March 2000 decision; the RO denied service connection for low back strain and asthma because the evidence failed "to establish any relationship between

[the conditions] and any disease or injury during military service." R. at 140. The December 2002 RO decision also informed the appellant that, in order to reopen his claims, he needed to provide medical evidence that the conditions had their onset during service. *See R.* at 369-70. The RO further informed the appellant that in order to reopen his claims, he must provide new and material evidence. *See* R. at 369 (stating that he must provide evidence that had "not been previously submitted and reviewed and which bears directly and substantially upon the claim" and providing that "[m]aterial evidence means the evidence shows that you have the disability and that it began or got worse while you were on active duty"). The November 2003 SOC also stated that the appellant had failed to submit any medical evidence that his degenerative back condition and asthma were incurred in *service*. *See* R. at 483-84. Moreover, contrary to the appellant's arguments, the appellant was informed that he could submit evidence in the form of medical opinions or lay statements. *See* App. Br. at 5, 8, 17, 18. The August 2002 letter specifically informed the appellant: "[Y]ou can give us a medical opinion from your own doctor." R. at 341. The letter also informed the appellant,

under a subheading reading "What Type of Evidence Should You Submit?", that he should provide the RO with inter alia, "a statement from your doctor, including the physical and clinical findings" or "statements from other people who can describe how your disability has become worse." *Id.* Finally, the letter stated: "If you have not recently been examined or treated by a doctor you may submit your own statement." R. at 342.

The record on appeal also demonstrates that the appellant was aware of what evidence had not been submitted previously, and he had actual knowledge of the evidence required to substantiate his claims for service connection for his conditions. *See Mayfield,* 19 Vet.App. at 121 (noting that no prejudice exists when a Claimant has actual knowledge of the evidence required). In response to the August 2002 RO letter, the appellant submitted a statement, along with private medical records, that he was treated for his conditions during service. *See* R. at 360-65. In the July 2003 NOD, he also indicated personal knowledge regarding the need for medical evidence to support his claims. *See* R. at 374. Moreover, the appellant testified at the May 2004 Board hearing that he received medical treatment for 'asthma from 1964 through 1966, but that the private

physicians who provided that treatment were deceased and records could not be secured. *See* R. at 546-47. He further stated that he was under the care of a doctor for his back condition shortly after service, but could not locate any record of this treatment. R. at 553-56. Finally, the appellant demonstrated actual knowledge that he could submit medical opinions when he acknowledged in his July 2003 NOD that " [medical evidence includes such things as . medical opinion." R. at 374. The appellant again demonstrated this knowledge when he submitted to the RO a July 2001 private examination report and requested that a VA physician evaluate him and provide the RO with a medical opinion. *See* R. at 361-65, 561. Thus, in light of the aforementioned correspondence and the appellant's actual knowledge of the information and evidence necessary to substantiate his claims, as evidenced by his active participation in developing the additional evidence, the Court concludes that the appellant had an opportunity to meaningfully participate in the adjudication of his claim, and did so participate; therefore, he was not prejudiced by VA's failure to comply with the first statutory notice element. *See Conway,* 353 F.3 d. at 1375; *Overton,* 20 Vet.App. at 433; *see also Kent,* 20 Vet.App. at 10.

With regard to the second and third elements of notice, the appellant has not specifically alleged that he was prejudiced by the lack of notice. Accordingly, the Court holds that the Board's error in finding that VA had fulfilled its duty to notify the appellant was nonprejudicial as to these claims. *See Overton*, 20 Vet.App. at 435 ("[T]he appellant, generally bears the burden of showing how any error is prejudicial or has affected the essential fairness of the adjudication."); *Marciniak* v. *Brown*, 10 Vet.App. 198, 201 (1997) (holdng that VA error was not prejudicial where "appellant has not alleged with specificity any prejudice that resulted from [such error]"); *Parker v. Brown*, *9* Vet.App. 476, 480-81. (1996) (same).

The appellant also argues that VA failed to comply with the duty to assist when it did not comply with his request to obtain various private medical records. *See* App. Br. at 13-14. The Secretary has a duty to assist pursuant to 38 U.S.C. § 5103A(a), under which he must "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary." 38 U.S.C. § 5103A(a)(1). If the evidence obtained

indicates that there is no reasonable possibility that further assistance would substantiate the claim, VA may discontinue such efforts. *See id.Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs,* 345 F.3d 1334, 1355-57 (Fed. Cir. 2003) (holding that, pursuant to section 5103A(a)(2), the Secretary "is not required to provide assistance to a claimant under this section if no reasonable possibility exists that such assistance would aid in substantiating the claim"). In the instant case, the Board found that VA. fulfilled its duty to assist, recognizing that the appellant "stated that records from his private doctors were no longer available." R. at 4. The Court agrees. At the May 2004 Board hearing, both the appellant and his representative testified that the medical records could not be obtained. *See* R. at 546-47. Therefore, the Court concludes, given the appellant's own assertions that these records were impossible to obtain, that VA complied with the duty to assist.

The Court will not address any arguments that the appellant may have intended to set forth in sections C and D of his opening brief. The appellant's third argument is entitled: "C. The appellant's failure to receive any VCAA notice from the RO prior to the May 24, 2001 Rating decision means that adjudication

was never completed, is still pending, was never adjudicated and that such failure was clearly erroneous and that such failures were prejudicial to the appellant." App. Br. at 14., However, the entirety of the argument presented instructs e Court to " [S]ee facts above." *Id.* The appellant's fourth argument is entitled: "D. The Board Did Not Account for All the Favorable Evidence and Therefore Did Not Base its Decision on the Entire Record or All the Evidence 38 U.S.C. 7104(a)." Id. Similarly, the brief presents no actual argument in support of this subheading.

Pursuant to Rule 25 of the Court's Rules of Practice and Procedure (Rules), the appellant's brief must contain, *inter alia,* "an argument, beginning with a summary and containing the appellant's contention with respect to the issue and the reasons for those contentions, with citations to the authorities and parts of the record on appeal rehed on." U.S. VET, APP. R 28(a)(5). The Court holds that the arguments made in the appellant's opening brief are wholly lacking in "the reasons for those contentions." The attempt to condense the entirety of two arguments into two separate subheadings consisting of single, run-on sentences with no subsequent analysis

does not conform to the requirements of Rule 28. Moreover, it is the appellant's obligation to "plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments." *Coker v. Nicholson,* 19 Vet.App. 439, 442, (2006); *see also Hernandez v. Starbuck,* 69 F.3d 1089, 1093 (10th Cir. 1995) (holding that an appellant, who comes to a court of appeals as the challenger of an underlying decision, "bears the burden of demonstrating the alleged error and the precise relief sought"). The appellant has not done so here. Consequently, the Court finds that, as presented, the appellant's remaining arguments are without merit.

Indeed, the entirety of the appellant's opening brief is remarkable only for its overall unhelpfulness. Although the appellant's counsel has included a table of contents in his opening brief as mandated by Rule 28 of this Court's Rules, the table of contents provides incorrect page citations to one section of his brief and redundantly refers to the section entitled "Statement of Issues Presented for Review" twice. *See* App. Br. at ii; U.S. VET. APP. R. 28(a)(1). In the Table of Authorities section of his opening brief the appellant's

counsel includes multiple entries to 38 U.S.C. § 5103(a), 38 C.F.R. §3.159(b), and three precedential Court decisions; yet, he does not list in this section many of the authorities on which he relies in the body of his brief. *See* App. Br. at iii; *see also U.S.* VET. APP. R. 28(a)(2). These are examples of the easily preventable errors that only contribute to the delay involved in the processing of a veteran's appeal.

The next section of the appellant's opening brief, entitled "Statement of Issues Presented for Review," is rudimentary at best as the appellant's counsel merely has pasted into this section the subheadings as they appear in the argument section of his brief. *See* App. Br. at 1-2. An effective brief *assigns* a heading for each issue, ensuring that each heading consists of a forceful, yet concise, declaration of the argument, and does not analyze more than one issue under a single heading. The subheadings contained within this brief consist of single, run-on sentences, several of which are disorienting and rambling. This approach does not reflect well on the practitioner's professionalism.

Pursuant to Rule 28 of this Court's Rules, the appellant's brief also must contain "a statement of

the case, showing briefly the nature of the case, the course of proceedings, the result below, and the facts relevant to the issues, with appropriate references to the record on appeal." U.S. VET. APP. R. 28(a)(4). The statement of the case should include a thorough, yet concise, overview of the background of the case, which adequately separates argument from fact. Not only does most of this section in the appellant's opening brief consist largely of argument, but the facts —what little of the facts the appellant's counsel chooses to discuss — are not presented in any semblance of order that is beneficial for review.

The argument section of the appellant's opening brief *is* woefully inadequate as well. Throughout the brief, the appellant's counsel makes vague, sweeping statements in reference to particular errors, immediately directing the reader to refer to a separate, and unspecified, portion of the brief. *See, e.g.,* App. Br. at 6 ("This case requires that the VCAA be considered in the Appellant's case. See the facts above."); *see also, e.g.,* App. Br. at 4, 10, 14. The appellant's counsel's habit of instructing the Court to refer to other portions of his analysis serves only to add to the

confusing framework of the brief.

The appellant's brief also relies heavily on boilerplate recitation of the law, but is very light on analysis. For example, section E of the appellant's opening brief is approximately five pages in length, approximately four sentences of which the Court Construes as analysis of how he was prejudiced by a lack of VCAA notice. *See* App. Br. at 14-18. In this regard, the appellant's counsel appears to have pasted several block quotes from an online legal research database into his brief, all of which appear without explanation or citation to the proper authority. *See* App. Br. at 8-9,11-13, 15. Equally egregious is that the appellant's counsel apparently could not be bothered to remove citations to the online database's page division demarcations and hyperlinks to the authorities contained therein. *See id.* Finally, the Court notes that the format of the appellant's opening brief consists of different typefaces, and large portions of both the appellant's opening brief and reply brief appear to be unedited or unfinished and are replete with spelling and grammatical errors. *See, e.g.,* App. Br. at 10 ("These notices left the appellant with no understanding of the issues to be adjudicated per *Pelegrini v. Principi,* 18

Vet.App. 112 (2004)[",] that was decided *before/after* the [Board] decision that is the subject of this appeal.") (emphasis added); Appellant's Reply Brief at 2 ("VA has Satisfied its duty to notify by means of a letter from the *ER road* to the veteran in. August 2002.") (emphasis added). The appellant's counsel also refers to different versions of pertinent regulations with no explanation for doing so; mischaracterizes statements contained in. the underlying Board decision; and provides no record citations for any of his arguments. The Court does not tolerate substandard briefs. Whether his filings were the product of laziness, ineptitude, and/or lack of respect for this Court's Rules, the appellant's counsel has caused a great disservice to one of our Nation's veterans.'

Based on the foregoing analysis, the appellant's and the Secretary's briefs, and a review of the record on appeal, the Board's September 3, 2004, decision is AFFIRMED.

DATED: MAR 13 2007

Copies to:

Hugh D. Cox, Esq.

failteS B. Thompson

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Supreme Court, U.S.
FILED

091371 JAN 7 - 2010

OFFICE OF THE CLERK

No. 10

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES B. THOMPSON,

Petitioner

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS,

Respondent,

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Federal Circuit

CREECH LAW FIRM, P.A.

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Dated: May 7, 2010

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Note: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2009-7070

JAMES B. THOMPSON

Claimant-Appellant,

v.

ERIC K. SHINSEKI,
Secretary of Veterans Affairs

Respondent-Appellee.

Judgment

ON APPEAL FROM	United States Court of Appeals for veterans Claims
CASE NO.	04-2176

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (MAYER, LOURIE, and PROST, Circuit Judges)

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

Dated: October 13, 2009 /S/ Jan Horbally, Clerk

ISSUED AS A MANDATE:

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR

VETERAN'S CLAIMS

No. 04-2176 JAMES B THOMPSON, APPELLANT,

V.

R. JAMES NICHOLSON,
SECREARY OF VETERANS AFFAIRS, APPELLEE.

Note: Pursuant to U.S. Vet. App. R. 30(a) this action may not be cited as precedent.

MOORMAN, *Judge:* The appellant, James B. Thompson, appeals through counsel September 3, 2004, Board of Veterans' Appeals (Board) decision that determined that new and material evidence to reopen his claims for entitlement to service connection for a low back disorder and for asthma had not been received. Record (R.) at 1-9. Both parties have filed briefs, and the appellant has filed a reply brief. On appeal, Mr. Thompson argues that VA failed to comply with its duties to notify and assist him with his claims. *See* Appellant's Brief (App. Br.) at 6-18. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). A single judge may

conduct this review. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons set forth below, the Court will affirm the September 2004 Board decision.

Mr. Thompson served on active duty in the U.S. Army from December 1961 to September 1964. R. at 13. In January 2000, Mr. Thompson filed claims for service connection for a low back condition and asthma. R at 57-58. In March 2000 and May 2001, a VA regional office (RO) denied Mr. Thompson's claims because the evidence failed to show that his low back strain or asthma were incurred in or aggravated by his period of service or that there was evidence of a nexus between the conditions and service. R. at 136-41, 143-46. Mr. Thompson did not appeal the May 2001 RO decision, and it became final.

In July 2002, Mr. Thompson requested that the RO reopen his claims for service connection for, inter alia, low back strain and asthma. R. at 148. In August 2002, the RO sent Mr. Thompson a letter informing him of the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096. R. at 340. In December 2002, the RO declined to reopen Mr. Thompson's claims. R. at 367-70. Mr. Thompson filed a

confusing framework of the brief.

The appellant's brief also relies heavily on boilerplate recitation of the law, but is very light on analysis. For example, section E of the appellant's opening brief is approximately five pages in length, approximately four sentences of which the Court Construes as analysis of how he was prejudiced by a lack of VCAA notice. *See* App. Br. at 14-18. In this regard, the appellant's counsel appears to have pasted several block quotes from an online legal research database into his brief, all of which appear without explanation or citation to the proper authority. *See* App. Br. at 8-9,11-13, 15. Equally egregious is that the appellant's counsel apparently could not be bothered to remove citations to the online database's page division demarcations and hyperlinks to the authorities contained therein. *See id.* Finally, the Court notes that the format of the appellant's opening brief consists of different typefaces, and large portions of both the appellant's opening brief and reply brief appear to be unedited or unfinished and are replete with spelling and grammatical errors. *See, e.g.*, App. Br. at 10 ("These notices left the appellant with no understanding of the issues to be adjudicated per *Pelegrini v. Principi*, 18

inform the appellant of what evidence was necessary to substantiate his claim is presumptively prejudicial. *See Overton v. Nicholson,* 20 Vet.App. 427, 436 (2006); *Mayfield v. Nicholson,* 19 Vet.App. 103, 120-21 (2005), *rev'd on other grounds, Mayfield v. Nicholson;* 444 F.3d 028 (Fed. Cir. 2006). The provisions of the VCAA apply to claims to reopen a previously denied claim, and the Court has held: "VA must notify a claimant of the evidence and information that is necessary to reopen the claim and VA must notify the claimant of the evidence and information that is necessary to establish his entitlement to the underlying claim for the benefit sought by the claimant." *Kent v. Nicholson,* 20 Vet.App. 1, 9 (2006).

The appellant's first argument concerning the duty to notify is that "VA must explain what evidence must be submitted to win this claim and what evidence this claim is lacking." App. Br. at 8. However, this argument is without merit because the Secretary has no duty to provide this type of notice. *See Locklear v. Nicholson,* 20 Vet.App. 410, 415-16 (2006) (stating that section 5103(a) does not require "predecisional adjudication' of evidence and "the duty to notify deals with evidence gathering, not the analysis of already gathered evidence").

The appellant also contends that "the Secretary

failed to adjudicate the May 2001 Rating Decision since the VCAA notices prior to that time were not in accordance with the VCAA 2000." App. Br. at 6. The Court has no jurisdiction to consider this argument because the May 2001 RO decision became final when the appellant failed to file a timely appeal following that decision. However, to the extent that the appellant argues that VA failed to satisfy its duty to notify him with respect to his July 2002 request to reopen his claims, the Court has jurisdiction to address this argument because it was the subject of a timely-appealed final Board decision. *See* 38 U.S.C. § 7266(a); *Breeden v. Principi*, 17 VetApp. 475, 477-78 (2004); *Bondy v. Derwinski*, 2 Vet.App. 376, 377 (1992) (per curiam order) (holding that the Court's jurisdiction is confined to a review of final Board decisions adverse to the claimant).

With respect to his July 2002 request to reopen, the Board found that VA provided the appellant with VCAA notice in the August 2002 letter from the RO. *See* R. at 3. The Court concludes that the Board erred in this regard because, although this letter generally informed the appellant that he needed new and material evidence to reopen his claims, it did not contain notice that was sufficiently tailored to the appellant's claims to

reopen. *See* R. at 3; *see also Kent, supra; Locklear,* 20 Vet.App. at 416. Specifically, the August 2002 letter did not describe what information or evidence was necessary to substantiate the elements required to establish service connection that were found insufficient in the previous denial. *See R.* at 340-41; *Kent,* 20 Vet.App. at 10 ("[T]he VCAA requires the Secretary to look at the bases for the denial in the prior decision and to respond With a notice letter that describes what evidence would be necessary to substantiate that "element or elements required to establish service connection that were found insufficient in the previous denial. Therefore, the question of what constitutes material evidence to reopen a claim for service connection depends on the basis on which the prior claim was denied"). Having found error, the Court must take due account of the rule of prejudicial error. *See Conway V. Principi,* 353 F.3 d 1369, 1375 (Fed. Cir. 2004); *Overton,* 20 Vet.App. at 433. To do so, the Court will examine the entire record to determine whether the appellant had a meaningful opportunity to participate in the processing of his claims.

In its March 2000 decision; the RO denied service connection for low back strain and asthma because the evidence failed "to establish any relationship between

[the conditions] and any disease or injury during military service." R. at 140. The December 2002 RO decision also informed the appellant that, in order to reopen his claims, he needed to provide medical evidence that the conditions had their onset during service. *See R.* at 369-70. The RO further informed the appellant that in order to reopen his claims, he must provide new and material evidence. *See* R. at 369 (stating that he must provide evidence that had "not been previously submitted and reviewed and which bears directly and substantially upon the claim" and providing that "[m]aterial evidence means the evidence shows that you have the disability and that it began or got worse while you were on active duty"). The November 2003 SOC also stated that the appellant had failed to submit any medical evidence that his degenerative back condition and asthma were incurred in *service*. *See* R. at 483-84. Moreover, contrary to the appellant's arguments, the appellant was informed that he could submit evidence in the form of medical opinions or lay statements. *See* App. Br. at 5, 8, 17, 18. The August 2002 letter specifically informed the appellant: "[Y]ou can give us a medical opinion from your own doctor." R. at 341. The letter also informed the appellant,

under a subheading reading "What Type of Evidence Should You Submit?", that he should provide the RO with inter alia, "a statement from your doctor, including the physical and clinical findings" or "statements from other people who can describe how your disability has become worse." *Id.* Finally, the letter stated: "If you have not recently been examined or treated by a doctor you may submit your own statement." R. at 342.

The record on appeal also demonstrates that the appellant was aware of what evidence had not been submitted previously, and he had actual knowledge of the evidence required to substantiate his claims for service connection for his conditions. *See Mayfield,* 19 Vet.App. at 121 (noting that no prejudice exists when a Claimant has actual knowledge of the evidence required). In response to the August 2002 RO letter, the appellant submitted a statement, along with private medical records, that he was treated for his conditions during service. *See* R. at 360-65. In the July 2003 NOD, he also indicated personal knowledge regarding the need for medical evidence to support his claims. *See* R. at 374. Moreover, the appellant testified at the May 2004 Board hearing that he received medical treatment for 'asthma from 1964 through 1966, but that the private

physicians who provided that treatment were deceased and records could not be secured. *See* R. at 546-47. He further stated that he was under the care of a doctor for his back condition shortly after service, but could not locate any record of this treatment. R. at 553-56. Finally, the appellant demonstrated actual knowledge that he could submit medical opinions when he acknowledged in his July 2003 NOD that " [medical evidence includes such things as . medical opinion." R. at 374. The appellant again demonstrated this knowledge when he submitted to the RO a July 2001 private examination report and requested that a VA physician evaluate him and provide the RO with a medical opinion. *See* R. at 361-65, 561. Thus, in light of the aforementioned correspondence and the appellant's actual knowledge of the information and evidence necessary to substantiate his claims, as evidenced by his active participation in developing the additional evidence, the Court concludes that the appellant had an opportunity to meaningfully participate in the adjudication of his claim, and did so participate; therefore, he was not prejudiced by VA's failure to comply with the first statutory notice element. *See Conway*, 353 F.3 d. at 1375; *Overton*, 20 Vet.App. at 433; *see also Kent*, 20 Vet.App. at 10.

With regard to the second and third elements of notice, the appellant has not specifically alleged that he was prejudiced by the lack of notice. Accordingly, the Court holds that the Board's error in finding that VA had fulfilled its duty to notify the appellant was nonprejudicial as to these claims. *See Overton,* 20 Vet.App. at 435 ("[T]he appellant, generally bears the burden of showing how any error is prejudicial or has affected the essential fairness of the adjudication."); *Marciniak* v. *Brown,* 10 Vet.App. 198, 201 (1997) (holdng that VA error was not prejudicial where "appellant has not alleged with specificity any prejudice that resulted from [such error]"); *Parker v. Brown, 9* Vet.App. 476, 480-81. (1996) (same).

The appellant also argues that VA failed to comply with the duty to assist when it did not comply with his request to obtain various private medical records. *See* App. Br. at 13-14. The Secretary has a duty to assist pursuant to 38 U.S.C. § 5103A(a), under which he must "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary." 38 U.S.C. § 5103A(a)(1). If the evidence obtained

indicates that there is no reasonable possibility that further assistance would substantiate the claim, VA may discontinue such efforts. *See id.Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs*, 345 F.3d 1334, 1355-57 (Fed. Cir. 2003) (holding that, pursuant to section 5103A(a)(2), the Secretary "is not required to provide assistance to a claimant under this section if no reasonable possibility exists that such assistance would aid in substantiating the claim"). In the instant case, the Board found that VA fulfilled its duty to assist, recognizing that the appellant "stated that records from his private doctors were no longer available." R. at 4. The Court agrees. At the May 2004 Board hearing, both the appellant and his representative testified that the medical records could not be obtained. *See* R. at 546-47. Therefore, the Court concludes, given the appellant's own assertions that these records were impossible to obtain, that VA complied with the duty to assist.

The Court will not address any arguments that the appellant may have intended to set forth in sections C and D of his opening brief. The appellant's third argument is entitled: "C. The appellant's failure to receive any VCAA notice from the RO prior to the May 24, 2001 Rating decision means that adjudication

was never completed, is still pending, was never adjudicated and that such failure was clearly erroneous and that such failures were prejudicial to the appellant." App. Br. at 14., However, the entirety of the argument presented instructs e Court to " [S]ee facts above." *Id.* The appellant's fourth argument is entitled: "D. The Board Did Not Account for All the Favorable Evidence and Therefore Did Not Base its Decision on the Entire Record or All the Evidence 38 U.S.C. 7104(a)." Id. Similarly, the brief presents no actual argument in support of this subheading.

Pursuant to Rule 25 of the Court's Rules of Practice and Procedure (Rules), the appellant's brief must contain, *inter alia,* "an argument, beginning with a summary and containing the appellant's contention with respect to the issue and the reasons for those contentions, with citations to the authorities and parts of the record on appeal relied on." U.S. VET. APP. R. 28(a)(5). The Court holds that the arguments made in the appellant's opening brief are wholly lacking in "the reasons for those contentions." The attempt to condense the entirety of two arguments into two separate subheadings consisting of single, run-on sentences with no subsequent analysis

does not conform to the requirements of Rule 28: Moreover, it is the appellant's obligation to "plead with *some* particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments." *Coker v. Nicholson*, 19 Vet App. 439, 442, (2006); *see also Hernandez v. Starbuck*, 69 F.3d 1089, 1093 (10th Cir. 1995) (holding that an appellant, who comes to a court of appeals as the challenger of an underlying decision, "bears the burden of demonstrating the alleged error and the precise relief sought"). The appellant has not done so here. Consequently, the Court finds that, as presented, the appellant's remaining arguments are without merit.

Indeed, the entirety of the appellant's opening brief is remarkable only for its overall unhelpfulness. Although the appellant's counsel has included a table of contents in his opening brief as mandated by Rule 28 of this Court's Rules, the table of contents provides incorrect page citations to one section of his brief and redundantly refers to the section entitled "Statement of Issues Presented for Review" twice. *See* App. Br. at ii; U.S. VET. APP. R. 28(a)(1). In the Table of Authorities section of his opening brief the appellant's

counsel includes multiple entries to 38 U.S.C. § 5103(a), 38 C.F.R. §3.159(b), and three precedential Court decisions; yet, he does not list in this section many of the authorities on which he relies in the body of his brief. *See* App. Br. at iii; *see also U.S.* VET. APP. R. 28(a)(2). These are examples of the easily preventable errors that only contribute to the delay involved in the processing of a veteran's appeal.

The next section of the appellant's opening brief, entitled "Statement of Issues Presented for Review," is rudimentary at best as the appellant's counsel merely has pasted into this section the subheadings as they appear in the argument section of his brief. *See* App. Br. at 1-2. An effective brief *assigns* a heading for each issue, ensuring that each heading consists of a forceful, yet concise, declaration of the argument, and does not analyze more than one issue under a single heading. The subheadings contained within this brief consist of single, run-on sentences, several of which are disorienting and rambling. This approach does not reflect well on the practitioner's professionalism.

Pursuant to Rule 28 of this Court's Rules, the appellant's brief also must contain "a statement of

the case, showing briefly the nature of the case, the course of proceedings, the result below, and the facts relevant to the issues, with appropriate references to the record on appeal." U.S. VET. APP. R. 28(a)(4). The statement of the case should include a thorough, yet concise, overview of the background of the case, which adequately separates argument from fact. Not only does most of this section in the appellant's opening brief consist largely of argument, but the facts —what little of the facts the appellant's counsel chooses to discuss — are not presented in any semblance of order that is beneficial for review.

The argument section of the appellant's opening brief *is* woefully inadequate as well. Throughout the brief, the appellant's counsel makes vague, sweeping statements in reference to particular errors, immediately directing the reader to refer to a separate, and unspecified, portion of the brief. *See, e.g.*, App. Br. at 6 ("This case requires that the VCAA be considered in the Appellant's case. See the facts above."); *see also, e.g.*, App. Br. at 4, 10, 14. The appellant's counsel's habit of instructing the Court to refer to other portions of his analysis serves only to add to the

Notice of Disagreement (NOD) in July 2003, and he was afforded a VA medical examination in September 2003. R. at 374, 464-66. In November 2003, the RO issued a Statement of the Case (SOC) *in* which it found that the September 2003 VA examination constituted new and material evidence sufficient to reopen the claim; however, the RO denied service connection for both conditions based on a lack of evidence that the conditions began in service. R. at 472-85. Mr. Thompson filed *a* Substantive Appeal, and, in. May 2004, Mr. Thompson was afforded a hearing before the Board. R. at 546-58. In September 2004, the Board issued the decision on appeal. R. at 1-9.

Pursuant to the VCAA, the Secretary is required to inform the claimant of the in formation and evidence not of record (1) that is necessary to substantiate the claim, (2) that the Secretary will seek to obtain, if any, and (3) that the claimant is expected to provide, if any. *See* 38 U.S.C. § 5103 (a); *Quartuccio v. Principi,* 16 Vet.App. 183, 187 (2002). The Secretary is also required to "request that the claimant provide any evidence in the claimant's possession that pertains to the claim." 38 C.F.R. § 3.159(b)(1) (2006); see *Pelegrini v. Principi,* 18 Vet.App. 112, 121 (2004). The Secretary's failure to

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Based on the foregoing analysis, the appellant's and the Secretary's briefs, and a review of the record on appeal, the Board's September 3, 2004, decision is AFFIRMED.

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